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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 533

CHARLES ICHIRO SUEHIRO, RICHARD YOSHIO SUEHIRO and ROBERT KIKUO SUEHIRO, *Petitioners,*

v.

HERBERT BROWNELL, JR., Attorney General of the United States as Successor to the Alien Property Custodian, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

HERBERT BROWNELL, JR., Attorney General of the United States as Successor to the Alien Property Custodian, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Charles Ichiro Suehiro, Richard Yoshio Suehiro and Robert Kikuo Suehiro pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the case of *Herbert Brownell, Jr., Attorney General of the United States as Successor to the Alien Property Custodian, Appellant*, v. *Charles Ichiro Suehiro, Richard Yoshio Suehiro and Robert Kikuo Suehiro, Appellees.*

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Hawaii (R. 38) has not been reported. The opinion of the Court of Appeals for the Ninth Circuit (R. 236) is reported at 206 F. (2d) 892.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 31, 1953 (R. 242). A petition for rehearing was denied on October 16, 1953 (R. 243).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals, in holding that in Hawaii no element of a memorandum sufficient to satisfy the statute of frauds may be supplied by parol, decided an important question of local law in a way contrary to applicable decisions of the Supreme Court of Hawaii.

2. Whether a United States citizen claiming title to real property vested by the Alien Property Custodian may be deprived of the right to make permanent improvements and repairs to such property, pending final adjudication of his claim of title.

STATUTES INVOLVED

The Federal Rules of Decision Act, 28 U. S. C. 1652, provides:

> "§ 1652. State laws as rules of decision.
>
> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Hawaiian Statute of Frauds, Revised Laws of Hawaii 1945, Chapter 166, sections 8721, 8722, provides:

> "Sec. 8721. Certain Contracts, when actionable. No action shall be brought and maintained * * *:
> * * *
>
> "4. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;
> * * *
>
> "Unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith, or by some person thereunto by him in writing lawfully authorized.
>
> "Sec. 8722. Consideration need not be in writing.
> "The consideration of any such promise, contract or agreement, need not be set forth, or expressed, in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence."

Section 9(a) of the Trading with the Enemy Act, as amended, 50 U. S. C. App. 9 (a), pursuant to which this suit to recover vested property was brought, provides:

> "§ 9. Claims to property transferred to custodian; notice of claim; filing, return of property; suits to recover.
>
> "(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides * * *."

SUMMARY STATEMENT OF THE CASE

The petitioners, all United States citizens, are the three sons of Umetaro and Sumi Suehiro, hereinafter referred to as the parents or the donors. The parents, permanent residents of the Territory of Hawaii for some forty years, were the owners in fee simple of a single parcel of real property in Honolulu. (R. 83, 212). In March 1941 the parents made an unconditional parol gift of that property to their three sons (R. 93-97, 134, 156, 175, 237), the petitioners, and shortly thereafter left for Japan, solely for reasons of health. (R. 97, 184, 237). The Japanese travel agency in Honolulu which handled the arrangements for their trip persuaded them (although the agency knew of the gift) not to transfer the record title prior to their departure, on the theory that to retain possession of the recorded deed might facilitate their return to the Territory. (R. 99, 237). The petitioners, as the District Court found, immediately entered into full possession of the premises, paid taxes, collected rents, made improvements and resided there, all under claim of title (R. 48). The parol gift by the parents to the sons was confirmed by a letter written by the parents from Japan on August 8, 1941.[1] (R. 125-126). In 1944, however, acting on the land records which still showed the legal title to the property in the name of the father, Umetaro, the Alien Property Custodian vested the property under the Trading with the Enemy Act, as amended (R. 13), and the sons thereupon filed claim (R. 12, 146, 161, 177), and later this suit (R. 3) to recover it.

The District Court held that the entire beneficial interest had effectively passed to the sons prior to the vesting order; that the Alien Property Custodian therefore took nothing but a bare legal or record title, and that the sons should recover. (R. 38-44). The Circuit Court reversed (R. 236-241) because it believed, although finding that the

[1] Inadvertently stated by the Circuit Court as August 8, 1951 (R. 240).

parents had made an unconditional parol gift of the property to the sons (R. 237), that the letter, with accompanying documents, forwarded by the parents in August 1941 was not a sufficient "memorandum or note" to take the matter out of the Hawaiian Statute of Frauds. In so concluding, the Circuit Court pointed out that, while the memorandum did contain two out of three essential elements for the purpose, namely, the names of the parties and a sufficient description of the property, it lacked an essential third element, namely, a statement of the terms and conditions of the transaction. In this connection the Circuit Court stated that there are no Hawaiian cases on the sufficiency of a memorandum to take a parol gift of land out of the statute of frauds, notwithstanding the fact that there are controlling decisions of the highest court of the Territory of Hawaii, not only dealing with the question of the sufficiency of such a memorandum, but clearly holding that the "terms and conditions", or the absence thereof, may be shown by parol evidence (see pp. 10-14, *infra*). In the instant case there was ample parol evidence to show the absence of any terms and conditions. (R. 93-97, 134, 156, 175). The conclusion of the Circuit Court is therefore directly contrary to the decisions of the Supreme Court of Hawaii.

The Circuit Court further held that the more substantial improvements made by the sons on the land, though admittedly sufficient to take the transfer out of the statute of frauds under the doctrine of part performance (recognized by the Circuit Court itself (R. 239-240) as the law of Hawaii and applicable), failed of that purpose for the reason that they were made after the issuance of the Custodian's vesting order. This supposedly not only placed title in the Custodian but divested United States citizen title claimants of any right to preserve or improve their property by their own efforts. In this the Circuit Court erroneously decided an important question under the Trading with the Enemy Act which has not been but should be decided by this Court (see pp. 14-18, *infra*).

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has decided an important question of local law in a way which is in conflict with the applicable decisions of the Supreme Court of Hawaii. This calls for the exercise by this Court of its corrective jurisdiction. The Circuit Court, in particular, ignored the decisions of the Territorial Supreme Court (including those which were called to its attention) in *Fishel* v. *Turner,* 13 Haw. 392; *De Luz* v. *Ramos,* 31 Haw. 799; *Vierra* v. *Ropert,* 10 Haw. 294; *Jordan* v. *Doucet,* 34 Haw. 651; *Vierra* v. *Shipman,* 26 Haw. 369, and *Vierra* v. *Shipman,* 27 Haw. 457, which are all authority for the exact opposite of the Circuit Court's conclusion.

The Circuit Court has thus reached outside the proper federal sphere into the outstandingly important field of validity of titles to real property, a field in which these controlling local decisions have established the law of the Territory for a period of approximately 50 years. This vitally affects all property owners and potential property owners in Hawaii, and the resulting uncertainty as to their tenure and as to the requisites for future transfers should be set at rest by this Court.

2. The Circuit Court has in effect held that because the Alien Property Custodian, by vesting, acquires title for certain purposes, a United States citizen may not take steps for the preservation of property which he has constantly and in accordance with remedies provided by Congress, maintained to be his own.[2] As regards United States citizens and friendly aliens, the Custodian's title is not confiscatory. Even section 39 of the Trading with the Enemy Act, as amended (50 U. S. C. App. 39), calls only for the non-return of *German* and *Japanese* property.

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[2] Petitioners herein filed their claim for return August 14, 1944 (R. 12), thus putting the Custodian on notice; and the improvements here under discussion were made thereafter and under that claim of right. (R. 164).

The decision of the Circuit Court is, therefore, in conflict with the principles underlying such decisions of this court as *Guessefeldt* v. *McGrath,* 342 U. S. 308; *Kaufman* v. *Société Internationale Pour Participations Industrielles et Commerciales S. A.,* 343 U. S. 156; *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480; and *Becker Steel Co. of America* v. *Cummings,* 296 U. S. 74. The precise point here at issue, however, has never been but should be explicitly decided by this Court.

The great scope of the vesting power under the Trading with the Enemy Act calls for the constant supervisory protection of this Court to the end that the rights of Americans shall not be curtailed beyond the intention of Congress and Constitutional requirements. The court below has now decided that an American does not have the right to preserve property which he constantly has claimed was his—not an enemy's, and not the Custodian's. This is contrary to the doctrine established by decisions of this Court that, as regards an American or friendly alien claimant, the Custodian holds only in "'preliminary custody'," subject to "the assertion of opposing or countervailing rights * * * *'unembarrassed by the precedent executive determination'.*" (Emphasis supplied). *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 53; and see *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stochr* v. *Wallace,* 255 U. S. 239.

If the American or friendly alien claimant has no right to preserve his property during vesting but prior to final adjudication, his claim for return may indeed be deeply "embarrassed", as in the instant case, and may even represent an empty right (see pp. 15-18, *infra*). The Circuit Court has here decided this important question of federal law in a way which adversely affects non-enemy claimants to vested property.

ARGUMENT

I

The Decision of the Circuit Court of Appeals for the Ninth Circuit is in Conflict with Applicable Decisions of the Supreme Court of Hawaii and is in Violation of the Federal Rules of Decision Statute

A. The Federal Rules of Decision Statute Requires the Circuit Court to Follow the Decisions of the Supreme Court of the Territory of Hawaii on a Question of Local Law

The Federal Rules of Decision Statute (p. 2, *supra*) is particularly applicable in matters involving rights and titles to real property. In *Hinde* v. *Vattier,* 5 Pet. 398, this Court said:

> "There is no principle better established, and more uniformly adhered to in this court, than that the circuit courts, *in deciding on titles to real property* in different states, are bound to decide as the state courts ought to do. * * * *The rules of* practice and of *evidence, whether derived from laws or adjudication of the judicial tribunals of a state, furnish the guides and rules of decision* in those of the union in all cases to which they apply; where the constitution, treaties, or statutes of the United States do not otherwise provide." (Emphasis supplied).

To the same effect, among numerous other authorities, are *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458; *Jewell* v. *Davies,* 192 F. (2d) 670, certiorari denied, 343 U. S. 904, and cases there cited. The general principle appears in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

The rule is equally applicable to decisions of the territorial or insular courts, *De Castro* v. *Board of Commissioners,* 322 U. S. 451, and specifically the Supreme Court of Hawaii. *United States* v. *Fullard-Leo,* 331 U. S. 256; *Waialua Agricultural Company* v. *Christian,* 305 U. S. 91. In the *Waialua* case, this Court stated:

> "In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and

> applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed on Hawaii."

In the present case the Circuit Court has erroneously stated (R. 241) that:

> "There are no Hawaiian cases on the sufficiency of a memorandum to take a parol gift of land out of the statute of frauds. Thus, we must be guided by general law."

In so stating the Circuit Court ignored applicable, controlling decisions of the Supreme Court of Hawaii, some of which had been called to its attention. (See pp. 12-14, *infra*).[3] This error cannot go uncorrected by this Court for it is not only in violation of the Federal Rules of Decision Statute and the consistent interpretation and application of that statute which we have shown, but if allowed to stand it would constitute a reversal of Hawaiian law on parol contracts and gifts, as laid down by the Supreme Court of the Territory.

Further, the issue is of importance for the reason that if the Circuit Court may ignore and fail to apply decisions of the Supreme Court of Hawaii in this instance and in this field of real property, there is no limit to the potential encroachment by the Circuit Courts upon the field confided exclusively to the highest courts of the several states and territories.

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[3] Since it stated they did not exist, the Circuit Court obviously did not cast doubt on the correctness or applicability of the Hawaiian decisions.

B. The Decisions of the Supreme Court of Hawaii Which the Circuit Court Ignored Established the Law Applicable to This Case and Should Have Been Followed by the Circuit Court

The Hawaiian Statute of Frauds (p. 3, *supra*) provides that no action shall be brought on a contract for the sale of lands (including a gift of land, as here), in the absence of a written "memorandum or note" of the transaction signed by the party to be charged.

In the present case the "memorandum or note" relied on by the petitioners to take the transaction out of the statute of frauds consists of a letter written by the parents (the donors) from Japan on August 8, 1941, and transmitted to their son, petitioner Charles Suehiro (one of the donees). Along with this letter, the donors transmitted the deed of the land to the father; and seven blank sheets of paper bearing the signatures of the donors, upon which they intended that a deed to the sons evidencing and confirming the prior gift should be written. The letter of August 8, 1941, stated in pertinent part (R. 125-126):

> "* * * I think that it is better to have the name of the house and land changed. Therefore, as this time Koizumi's boy goes back on August 16, we will send the *paper of land* by him. Therefore, receive it and immediately ask Attorney Higashihara to handle the matter * * *.
>
> "Ichiro [Charles], since it may be worrisome for you to divide, I shall show you a rough idea. Therefore, after that, do as you people deem best." (Emphasis supplied).

As the Circuit Court noted, "the 'paper of land' referred to is the deed of the land *to* the Parents" (R. 240); and it agreed that the *description* contained in this deed satisfied the requirement of the statute of frauds as to identification of the property, and was an integral part of the "memorandum." (R. 241). The Circuit Court further concluded that the requirement that the memorandum be

signed by the parties to be charged was satisfied by the letter of August 8, 1941 itself, to which the names of the donors were signed.

The Circuit Court, however, stated (R. 241):

> "The second requirement as to a document showing the *terms and conditions of the gift* has not been satisfied. None of the essential elements of a transaction required to be in writing by the statute of frauds can be supplied by parol evidence. Ochs v. Weil, 142 F. 2d 758 (D.C. Cir.); White v. Southern Kraft Corporation, 132 F. 2d 381 (Cir. 8). The memorandum is insufficient to take the gift out of the statute of frauds." (Emphasis supplied).[4]

In so holding, the Court relied on decisions of the Circuit Court of Appeals for the District of Columbia Circuit and the Circuit Court of Appeals for the Eighth Circuit, because it supposed, as it stated earlier in its opinion (R. 241), that

> "There are no Hawaiian cases on the sufficiency of a memorandum to take a parol gift of land out of the statute of frauds. Thus, we must be guided by general law."

Whether the Circuit Court considered itself to be applying "general law" or merely the two authorities which it cited, it erred in stating there were no Hawaiian cases on the subject and it doubly erred in failing to apply such cases, for the Hawaiian Supreme Court has ruled on the point and has held that the terms and conditions of a

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[4] The respondent argued in its reply brief below (but the Circuit Court did not hold) that the letter of August 8, 1941 was ineffective for the further reason that it constituted an unlicensed transfer of title, contrary to section 1 (E) of Executive Order No. 8389, as amended, which then prohibited, unless licensed, the transfer of "evidences of ownership" by a national of Japan. To that the short answer is that the Order was referring only to a document which evidences title in the sense that, if transferred, it would itself convey title; not to a mere confirmation of a prior transfer, evidentiary only in the sense of evidence admissible in a judicial proceeding.

transaction of this character, or the fact of the absence of any terms and conditions (as here), may be supplied by parol evidence, as was done in this case (R. 93-97, 134, 156, 175).

Thus, in the case of *Fishel* v. *Turner,* 13 Haw. 392, the only written evidence of terms and conditions consisted of a receipt stating the amount of the first payment for the land which was transferred and a letter from the grantor to the grantee referring merely to "your 140 [acres]." The Supreme Court of Hawaii held these to be sufficient in the absence of evidence that the contract contained any other terms. It held that the land itself could, to the extent necessary, be further identified or located by parol evidence; and that there might have been other terms in the oral contract of which there was no evidence and which were not set forth in any of the writings signed by the defendant, but that this was immaterial, it being, as the court stated (p. 397),

> "incumbent on the defendant to show that there were other terms not embodied in the writings, if he relies on that as a defense."

The case is authority for the proposition that, in Hawaii, not only consideration[5] but other terms and conditions as well, if they exist, may be supplied by parol evidence, and that it is a matter of defense to show that there were other terms.

In the face of the Circuit Court's holding in the instant case that *none* of the essential elements of a transaction required by the statute of frauds to be in writing can be supplied by parol evidence, *Fishel* v. *Turner, supra,* permits at least two out of the three essential elements, namely, identification of the property and terms and conditions, to be supplied by parol. In other words, in the instant case, two out of the three elements are, in the view of the

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[5] The statute expressly permits parol evidence of consideration. R. L. Hawaii, Ch. 166, Sec. 8722, p. 3, *supra.*

Circuit Court, sufficiently supplied in writing; in *Fishel* v. *Turner,* only one out of the three, namely, the names of the parties, was unequivocally supplied in writing, and yet there the contract was held enforceable notwithstanding the statute of frauds.

In *De Luz* v. *Ramos,* 31 Haw. 799, the Supreme Court of Hawaii again relied on parol evidence to help supply the essential elements of a memorandum. In that case the parol evidence supplied the term of the complainant-lessee's sub-lease upon which he was suing.

In *Vierra* v. *Ropert,* 10 Haw. 294, the Court, though unable to find that a complete contract had been proved, weighed the parol evidence equally with the written. It considered, as the opinion states (p. 300), "both the oral and written promises." Again, in *Jordan* v. *Doucet,* 34 Haw. 651, the Court stated, at 657:

> "• • • Notwithstanding this statute [statute of frauds] a contract for the sale of land executed by an agent of the owner in his own name as vendor and by the vendee in person may be enforced by bill for specific performance by the owner against the vendee and parol evidence is admissible to prove that petitioner was the owner and that the one who executed the contract as vendor acted with her authority and that she had complied with the terms of the contract."

In *Vierra* v. *Shipman,* 26 Haw. 369, an entire agreement to devise a ranch to the complainant was proved by what the donor had "told" the complainant, none of which was set forth in a "memorandum". That was a decision on demurrer. In the subsequent decision on the merits, *Vierra* v. *Shipman,* 27 Haw. 457, it was brought out that the devise itself was the only "memorandum". The Court, however, put aside the question whether this was a sufficient memorandum to take the case out of the statute of frauds and treated the devise as important only because it corroborated the oral testimony. In other words, there was to this extent a memorandum, but the terms of the contract,

which did not appear in the devise, were wholly proved by parol.[6]

In striking contrast, the Circuit Court in the instant case refused to consider the parol evidence. Proper application of *Vierra* v. *Shipman, supra*, and the other Hawaiian decisions cited would have led the Court to a conclusion exactly opposite to that which it reached. Its failure to consider the parol evidence was clearly error.

II

The Circuit Court, in Holding That a United States Citizen Claiming Title to Property Vested by the Alien Property Custodian, Has No Right to Protect His Interest by Making Improvements Pending Final Adjudication of Title, Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court

The petitioners contended below that not only was the transaction taken out of the statute of frauds because there was a "memorandum or note" sufficient for that purpose; but also that it was taken out of the statute of frauds by part performance, in that they made substantial, valuable and permanent improvements under a claim of right to the property.

Two of the donees volunteered prior to the vesting for service in the United States armed forces. (R. 153, 174).

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[6] 27 Haw., at 460: "The lands referred to in this devise are the lands comprising the cattle ranch of the decedent and the same lands referred to by him in his oral promise to the complainant. Passing by, as we did in the consideration of the demurrer, the question of whether or not this will constitute in itself a sufficient memorandum to take the case out of the statute of frauds, the fact remains that the making of these provisions in favor of the complainant *was evidence corroborative of his testimony at the trial and of that of the other witnesses called in his behalf.*

"We are not unmindful of the possibilities of perjury in cases of this general nature but feel entirely satisfied after a careful study of all of the evidence adduced that this is not a case based upon perjury and that the facts were in reality as alleged in the bill of complaint." (Emphasis supplied).

After they returned from that service the donees, in 1948,[7] expended approximately $2500.00 in permanent improvements on the property. (R. 139, 161). The Circuit Court, however, in reversing the District Court, held that the more substantial improvements could not constitute part performance, so as to take the gift out of the statute of frauds, because made after the vesting.[8] (R. 238, 240).

In support of this ruling, the Circuit Court cited no authority. The effect of the ruling is important to many non-enemy claimants to properties vested under the Trading with the Enemy Act. The question should, therefore, be settled by this Court.

It has been repeatedly held, in cases arising out of both World Wars I and II, that the taking of property by the Alien Property Custodian is confiscatory only as regards property which he may ultimately retain.

In *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 475, this Court stated:

> "Unquestionably to wage war successfully, the United States may confiscate *enemy property.*" (Emphasis supplied).

But in *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 485, it was said that the purpose of the 1941 Amendment to section 5(b) of the Trading with the Enemy Act (50 U. S. C. App. 5(b)) was

> "not to appropriate friendly or neutral assets, but to reach enemy interests which masqueraded under those innocent fronts."

In *Nagano* v. *McGrath*, 187 F. (2d) 759, affirmed by an equally divided court, 342 U. S. 916, the court, at 766,

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[7] Inadvertantly stated by the Circuit Court as 1944. (R. 239).

[8] Other, lesser, improvements had been made by the donees prior to the vesting order. (R. 138). The more substantial improvements had to await the relaxation (subsequent to the vesting) of the rigid controls over materials under military government in Hawaii. (R. 138, 139).

quoted from *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 79, as follows:

> "But in this authorizing the seizure of property as a war measure *Congress did not attempt the confiscation of the property of citizens or alien friends.*" (Emphasis supplied).

These holdings, of course, reaffirm for World War II purposes the basic World War I decisions in protection of the rights of citizens and alien friends, such as *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51; *Sutherland* v. *Kanawha Valley Bank,* 48 F. (2d) 1027, and others. As this Court recently said in *Guessefeldt* v. *McGrath,* 342 U. S. 308, at 319,

> "Certainly, the constitutional problem is not imaginary * * *. Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited."

Solicitude for the rights of United States citizens and friendly aliens characterizes the entire judicial history of the Trading with the Enemy Act and has caused review by this Court of a large proportion of the cases under that Act in which it has granted certiorari. Yet this Court has not settled the all-important question whether the American or friendly alien claimant of property taken by the Alien Property Custodian is deprived of the right to protect his interests during the period between the assertion of his claim, whereby the Custodian is put on notice, and final adjudication of the title—in short, during the period which must necessarily be one of "preliminary custody" (*Commercial Trust Co.* v. *Miller, supra,* at 53), because if it is more, the rights of citizens and alien friends, heretofore so sedulously protected by the courts, may be lost.

We do not fail to take account of the provisions of section 12 of the Trading with the Enemy Act in which the Custodian is given broad powers of management and control and indeed (unless and until suit for return is filed) the power of sale. But when final adjudication causes the return of property, with the result that its taking is conclusively shown to have been erroneous and unjustified in law, the remedy on which hinges the very constitutionality of the Trading with the Enemy Act is insufficient if in the meantime the right to protect the property is held to have disappeared. It may be that such right collides with the Custodian's powers of management and control during the temporary period of vesting, but the right always exists.

In the instant case, the donees, by claim duly filed under the regulations of the Custodian, put him on notice in 1944, within a few months after the vesting, that they contested the correctness of his seizure. The Custodian was thus told, in effect, that he was an interloper and that the donees claimed and would continue to claim the property as rightfully their own. This, we assert, constitutes the exercise of a subsisting right—a right which was not and could not have been destroyed, notwithstanding the provisions of section 12 of the Act and the broad scope of the vesting power, without doing violence to the protective provisions of section 9 as judicially construed.

This case is but one example of the effect which the Circuit Court's ruling may have on the rights of Americans and alien friends. Here the result of the Circuit Court's decision is that the petitioners' action, in good faith, in improving their claimed property, is not even available as evidence to sustain their title. The "precedent executive determination" has certainly "embarrassed" them (cf. *Commercial Trust Co.* v. *Miller, supra*). It is inconceivable that part performance is inadmissible as evidence to take this case out of the statute of frauds. The Circuit Court, however, in so holding, has

in substance decided that an American citizen may exercise no rights in his vested property for any purpose, or with any legal consequence.

That presents the question of federal law, erroneously decided by the Circuit Court, which this court should settle.

CONCLUSION

It is urged that this petition for a writ of certiorari should be granted so that this Court may correct the failure of the Circuit Court of Appeals for the Ninth Circuit to apply the local law with respect to the construction of the Hawaiian Statute of Frauds; and may settle the important question of federal law posed by the Circuit Court's denial of petitioners' right to make effective their consistently claimed interest in the property during the period of vesting.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1953

No. 533

CHARLES ICHIRO SUEHIRO, RICHARD YOSHIO SUEHIRO and ROBERT KIKUO SUEHIRO, *Petitioners*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, As Successor to the Alien Property Custodian

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Hawaii (R. 38-44) has not been reported. The opinion of the Court of Appeals for the Ninth Circuit (R. 236-241) is reported at 206 F. 2d 892.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 31, 1953 (R. 242). A timely petition for rehearing was denied on October 16, 1953 (R. 243). The petition for a writ of certiorari was filed on January 14, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

It is not disputed that in Hawaii an oral gift of real property is treated as a contract for the sale of land for purposes of the statute of frauds (Pet. 10). The questions presented are:

1. Whether the written evidence of an alleged oral gift which does not indicate the terms constitutes a memorandum sufficient under Hawaiian law to satisfy the statute of frauds.

2. Whether the gift is excepted from the requirements of the statute of frauds by the donee's improvements added after the Alien Property Custodian had vested the property and despite the Custodian's admonition against undertaking the improvements except at the donee's own risk.

STATUTES INVOLVED

Pertinent portions of Sections 8721 and 8722, Chapter 166, of the Hawaiian Statute of Frauds are set forth on page 3 of the Petition.

STATEMENT

This litigation concerns the application of the Hawaiian Statute of Frauds to an attempted oral gift of realty located in Honolulu.

Petitioners are the three sons of Umetaro and Sumi Suehiro ("the parents"), both natives and nationals of Japan (R. 83, 183). In 1923 the parents purchased the property in suit (R. 83, 85). Title was conveyed to them by deed duly recorded (R. 85).

According to the testimony of an elderly neighbor and the members of the Suehiro family, including petitioners, in March 1941, about a month before the departure of the parents for Japan, the father told petitioners that he was giving each a designated portion of the property (R. 93, 110-111, 134, 156, 175, 192-197). No deed to the premises was executed (R. 111, 121, 165). The father's explanation was that he left the record ownership in his own name undisturbed and took the recorded deed with him to Japan because he was persuaded by a travel agent in Hawaii that his return to Hawaii would thereby be facilitated (R. 99, 119).

The parents left for Japan in April 1941 (R. 91-92). On July 26, 1941, the existing federal controls over foreign property (Executive Order No. 8389, as amended by Executive Order 8785, 3 CFR, 1943 Cum. Supp., p. 948) were extended to Japan (Executive Order 8832, 3 CFR, 1943 Cum. Supp., p. 969), thus prohibiting transactions by or pursuant

to the direction of Japanese nationals or involving their property in the United States, unless authorized by license. On August 8, 1941,[1] the parents wrote the sons a letter which reads in part as follows (R. 125-126):

> . . . I think that it is better to have the name of the house and land changed. Therefore, as this time, Koizumi's boy goes back on August 16, we will send the paper of land by him. Therefore, receive it and immediately ask Attorney Higashihara to handle the matter . . . Ichiro, since it may be worrisome for you to divide, I shall show you a rough idea. Therefore, after that, do as you people deem best . . .

Then followed a diagram showing the division among the three sons. The "paper of land" referred to was the deed which the parents had taken with them to Japan. The letter was sent together with the deed and seven sheets of paper, blank except for the signature of the parents (R. 10-11, 102-103). These were entrusted to Koizumi, a friend then visiting in Japan, to take back to Hawaii (R. 101, 204). But Koizumi did not return to Hawaii with these until October 1941 (R. 10, 207).

In the meantime, in September 1941, pursuant to regulations which required the reporting on Form

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[1] Inadvertently referred to as August 8, *1951*, in the opinion of the court below (R. 240).

TFR-300 of property in which a national of Japan had an interest on July 26, 1941 (6 F.R. 3722, 31 CFR, Cum. Supp., Part 130), the eldest son (one of petitioners herein) filed a Form TFR-300 (Defendant's Exhibit 4). He reported the property as belonging to Umetaro Suehiro, the father, answered "None" to the question whether anyone else asserted any claim thereto and declared that he was filing the report as agent for his father. The report was prepared with the assistance of a lawyer who, according to the son, permitted the report to be thus prepared although informed that the property had been given to petitioners and that only the legal title remained in the father (R. 224-225). The son explained that he had executed the report because he believed that it dealt with only "legal" owners (R. 225).

In October, 1941, Koizumi, upon returning to Hawaii, delivered the August 8 letter, the deed and the otherwise blank signed sheets of paper. The purpose of the signed blank sheets, according to the father, was to enable the property to be transferred to the names of petitioners. (R. 10-11, 105.) In attempting the transfer, the eldest son was advised by his attorney that it could not be accomplished because of the foreign property controls (R. 142-143).

For the years 1941, 1942, 1943 and 1944, the eldest son, as agent of his father, filed territorial income tax returns in which he listed, as income be-

longing to the father, rentals obtained from other tenants of the property (Defendant's Exhibits 3-B to 3-E; R. 219). The son's explanation for thus preparing the returns was that the title was in his father's name (R. 223). The rentals collected during this period were deposited to the eldest son's account and were used to support his younger brothers (R. 135). The eldest son also paid the real estate taxes assessed in the father's name and the premiums on the fire insurance policy carried in the father's name (Defendant's Exhibits 1-A to 1-E; R. 136-137). In addition, he made minor repairs, such as changing window screens and fixing the floors (R. 138).

In April, 1944, the Alien Property Custodian, acting under authority of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*), vested the property as owned by the father (R. 13). The total amount spent for repairs, taxes and insurance for the period between the alleged gift in the spring of 1941 and the vesting in 1944 (R. 138, 140-141) was considerably less than the rents received from other tenants living on the property (Defendant's Exhibits 3-B to 3-E).

After the property had been vested, petitioners added to the existing dwellings by converting a workshop into living quarters, an improvement which petitioners valued at $2,500. The $2,500 includes $800 in materials and the balance for labor

provided by members of the family (R. 139, 141-142). This improvement was made notwithstanding the refusal of the Alien Property Custodian's representative in Hawaii to give his consent and despite his admonition that the undertaking would be at petitioners' own risk (R. 163-164).

In August 1951, petitioners brought this suit under Section 9(a) of the Act to recover the vested property from the Attorney General, as successor to the Alien Property Custodian (R. 1-13).[2] The District Judge rejected the Government's contention that the Hawaiian Statute of Frauds precluded the action and held that an effective oral gift of the property had been made (R. 38-44). He based his holding principally on the maxim that "equity looks upon that as done which ought to have been done," reasoning that, since the parents meant to execute a deed and would have done so but for the travel agent's advice to retain the paper title, the court should attach the same consequences as if a deed had been executed. In his findings (R. 44-55), the District Judge found as a fact that petitioners had made substantial building improvements (R. 48).

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[2] The functions and authority of the Alien Property Custodian were transferred to the Attorney General by Executive Order 9788, October 14, 1946, 11 F.R. 11981 (3 CFR, 1946 Supp., p. 169). In this brief, the term "Custodian" will be used to refer to the Alien Property Custodian or to the Attorney General as his successor.

The Court of Appeals reversed on the ground that the action was precluded by the Hawaiian Statute of Frauds. It held: (1) that since the substantial improvements were made subsequent to the vesting order, after the Custodian's representative had refused to give his consent and after the representative had admonished petitioners that they were proceeding at their own risk, the improvements could not be relied on as part performance to except the oral gift from the requirements of the Statute; and (2) that since the letter of August 8, 1941, and accompanying papers did not show the terms and conditions of the purported transfer, the kind of memorandum required to satisfy the Hawaiian Statute of Frauds was not supplied (R. 236-241).[3]

ARGUMENT

The questions presented are narrow in scope and of little consequence generally or locally. The Court of Appeals' holding on the elements of a memorandum required to satisfy the statute of

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[3] The court below did not pass on the contention pressed by respondent that the August 8 letter and accompanying papers, assuming they were sufficient as a memorandum, constituted "dealings in . . . evidences of ownership" prohibited by the foreign property controls (Executive Order 8389, as amended, *supra*) and that accordingly they were ineffective as against the Custodian to render enforceable an obligation which was unenforceable on the date those controls were extended to Japan. *Orvis* v. *Brownell,* 345 U.S. 183; *Propper* v. *Clark,* 337 U.S. 472.

frauds accords with such expressions on the issue as appear in Hawaiian cases and represents well settled law elsewhere. None of the cases cited by petitioners (Pet. 6) supports their assertion that the court's decision is in conflict with Hawaiian law and, with perhaps one exception, the cases do not even deal with the issue.

On the question as to the effect of improvements undertaken despite the refusal of consent for them, the Court of Appeals' holding that petitioners could not rely on them as against the Custodian to except the gift from the operation of the statute of frauds any more than they could as against the donor, represents but an application within a narrow frame of reference of the firmly established principle that the effect of a vesting order is, at least, to transfer to the Custodian all the rights of the former enemy owner.

1. The Sufficiency of the Memorandum

The Hawaiian Statute of Frauds (Pet. 3) provides that no action shall be brought on an agreement for the sale of lands in the absence of a written memorandum of the transaction signed by the party to be charged. It is not disputed that in Hawaii an oral gift of land is treated as an agreement of sale for purposes of the statute (Pet. 10); *Mokuai* v. *Kapuniai,* 6 Haw. 160; *Yee Hop* v. *Young Sak Cho,* 25 Haw. 494, 500. The court below held that the letter of August 8, 1941, and accom-

panying papers (*supra,* p. 4), since they do not contain the terms and conditions of the transaction, fail to qualify as a memorandum sufficient to satisfy the statute (R. 241).

Petitioners do not maintain that these papers set forth the terms and conditions. Their contention is that in Hawaii this deficiency may be supplied by parol evidence. But the parol evidence in virtually all the cases on which they rely (Pet. 6, 12-13) was considered merely to determine whether there was any agreement at all, oral or otherwise.[4] Of course, parol evidence may be used, as indeed it was in the instant case, to show that the transaction relied on did in fact take place. That, however, is beside the point. It is here assumed that the gift relied on was made. The question is whether the written memorandum of it is adequate to satisfy the statute of frauds.

[4] This is true of *DeLuz* v. *Ramos,* 31 Haw. 799, 806-807 (oral agreement enforced because of sufficient "part performance"); *Vierra* v. *Ropert,* 10 Haw. 294, 300-301 (statute of frauds issue not reached because existence of agreement not established); and *Vierra* v. *Shipman,* 26 Haw. 369, 373, and 27 Haw. 457, 460 (oral agreement enforced because of sufficient "part performance"; sufficiency of memorandum issue expressly left open).

Jardin v. *Doucet,* 34 Haw. 651, involved a written contract. The parol evidence considered there was to show an agent's authority to sign. In *Fishel* v. *Turner,* 13 Haw. 392, parol evidence was admitted to *explain* and *clarify* the language of a memorandum. But the issue in the case was whether the terms of an agreement, having been established by parol evidence, were "put in writing." 13 Haw. at 394 and 397.

We have found no cases in Hawaii permitting parol evidence to render sufficient a memorandum which does not set forth the terms and conditions of the transaction relied on. On the other hand, there are explicit indications in Hawaiian cases in support of the decision below that the terms must be contained in the memorandum. The Chief Justice of the Hawaiian Supreme Court, acting as chancellor in *Rose* v. *Parker,* 4 Haw. 593, left no doubt as to this when he quoted the following commentary with approval (4 Haw. at 598):

> The memorandum must contain the essential terms of the contract with such a degree of certainty that it may be understood without recourse to show the intention of the parties.

See also, *People's I. & R. Co.* v. *Haw. Electric Co.* 9 Haw. 434, 437.

The authorities elsewhere are to the same effect. 49 Am. Jur., *Statute of Frauds,* 635-636; 2 Williston, *Contracts* (1936), 1619, 1622; Restatement, *Contracts* (1932) § 207. "It is well settled that the memorandum must be complete in itself, and it cannot be eked out by parol evidence." 2 Williston, *Contracts* (1936) 1619.

2. The Improvements Made After Vesting

The improvements on which petitioners rely to except the gift from the application of the statute were made after the Custodian had vested the

property, and in spite of his admonition against their being undertaken except at petitioners' own risk (*supra,* pp. 6, 7). Petitioners do not argue that, prior to the date of vesting, there were improvements on which they could rely as against the original donor. Nor do they argue that they could rely on improvements as against the donor if added against his wishes. It is settled in Hawaii as elsewhere that the acts relied on to except a transaction from the requirements of the statute of frauds must be done with knowledge and consent. *Yee Hop* v. *Young Sak Cho,* 25 Haw. 494, 500; *DeLuz* v. *Ramos,* 31 Haw. 799, 808; *Rose* v. *Parker,* 4 Haw. 593, 599; 49 Am. Jur., *Statute of Frauds,* 739; 101 A.L.R., Anno.—*Oral Land Contract—Part Performance,* 1067.

Petitioners' contention, advanced for the first time in their petition for rehearing in the Court of Appeals, seems to be that they may nevertheless rely on the post-vesting improvements as against the Custodian apparently on the ground that the effect of the vesting order was to transfer nothing more than bare custody of the property, at least until petitioners' rights were finally adjudicated. This Court, however, has settled that the effect of a vesting order is to transfer to the Custodian all the enemy's rights "as completely as if by conveyance, transfer or assignment." *Commercial Trust Co.* v. *Miller,* 262 U.S. 51, 56; *Cummings* v.

Deutsche Bank, 300 U.S. 115, 120.[5] Indeed, the Custodian may "exercise any rights or powers" with respect to the vested property "as though he were the absolute owner thereof * * *". Section 12 of the Trading with the Enemy Act, 40 Stat. 423, as amended, 50 U.S.C. App. 12; *United States* v. *Chemical Foundation,* 272 U.S. 1, 10-12. Hence, the Court of Appeals' holding that petitioners could not avail themselves of the improvements as against the Custodian, he being the "successor to the donor" (R. 240), was manifestly a correct application of a familiar and well established principle.

3. The Questions Presented Are of Little Consequence

The kind of memorandum of an oral gift of land required to satisfy the Hawaiian Statute of Frauds is of no consequence generally, and is of slight moment even in Hawaii. So far as we have

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[5] To the same effect: *United States* v. *The Antoinetta,* 153 F. 2d 138, 143 (C. A. 3), certiorari denied, 328 U.S. 863; *Polaroid Corporation* v. *Markham,* 148 F. 2d 219, 220 (C.A.D.C.); *Balkan Nat. Ins. Co.* v. *Com'r of Internal Revenue,* 101 F. 2d 75, 77 (C.A. 2); *Com'r of Internal Revenue* v. *Stearns,* 65 F. 2d 371, 374 (C.A. 2); *United States* v. *Borax Consol.,* 62 F. Supp. 220, 223 (N.D. Calif.); *Sarazin* v. *Wright Aeronautical Corp.,* 54 F. Supp. 244, 252 (S.D. N.Y.); *Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.,* 254 Fed. 852, 860 (S.D.N.Y.); *Vahle* v. *Markham,* 5 F.R.D. 315 (E.D. Pa.); *Todeva* v. *Oliver Iron Mining Co.,* 232 Minn. 422, 430-431, 45 N.W. 2d 782, 789; *Matter of Viscomi,* 270 App. Div. 732, 60 N.Y.S. 2d 897; *Stern* v. *Newton,* 180 Misc. 241, 246, 39 N.Y.S. 2d 593, 598.

been able to find, there is but one case passed upon by the Hawaiian Supreme Court which involved the application of the statute of frauds to an oral gift of land (*Rose* v. *Parker,* 4 Haw. 593) and that case was decided over three-quarters of a century ago and did not involve the sufficiency of a memorandum. Therefore, it cannot be said that the decision below misapplied Hawaiian law on the issue. But, in any event, review by this Court on an issue recurring so infrequently is scarcely warranted.

To make out an important federal question, petitioners repeatedly assert that what is at stake here is the right of an American claimant to "preserve" (Pet. 5, 6, 7) or "protect" (Pet. 14, 16, 17) his interest in vested property pending final adjudication of his claim. That is not the issue here at all. The question, raised for the first time in petitioners' request for rehearing below, apparently as an afterthought, is whether petitioners may avail themselves as against the Custodian of improvements on which they could not rely as against the donor to except their oral gift from the statute of frauds requirements. The Court of Appeals' resolution of that question is based upon a correct application of a familiar and well settled principle as to the effect of a vesting order and requires no further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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